

FEDERAL CIRCUIT COURT OF AUSTRALIA

*NGUYEN v MINISTER FOR IMMIGRATION &
ANOR*

[2016] FCCA 2731

Catchwords:

MIGRATION – Administrative Appeals Tribunal (Migration & Refugee Division) – Partner (Provisional) (Class UF) visa – whether the Tribunal failed to have regard to the untranslated documents – whether the Tribunal failed to comply with the statutory requirements of s.359A and s.359AA – no jurisdictional error identified – application dismissed.

Legislation:

Migration Act 1958 (Cth), ss.5F, 359A, 359AA, 476.

Migration Regulations 1994 (Cth), reg.1.15A, cl. 309.211, 309.221 of Sch.2.

Applicant:	THI NGOC NO NGUYEN
First Respondent:	MINISTER FOR IMMIGRATION & BORDER PROTECTION
Second Respondent:	ADMINISTRATIVE APPEALS TRIBUNAL
File Number:	SYG 1571 of 2016
Judgment of:	Judge Street
Hearing date:	24 October 2016
Date of Last Submission:	24 October 2016
Delivered at:	Sydney
Delivered on:	24 October 2016

REPRESENTATION

Counsel for the Applicant: Ms U Okereke-Fisher

Solicitors for the Applicant: Andy Pham Lawyers

Solicitors for the Respondents: Mr D McLaren
Minter Ellison Lawyers

ORDERS

- (1) Leave is granted for the Applicant to rely upon the ground 1 identified in the Applicant's submissions and the Court dispenses with the need to file an amended application.
- (2) The Court extends time under s.477 of the *Migration Act 1958* (Cth) up to 21 June 2016.
- (3) The application is dismissed.
- (4) The Applicant pay the First Respondent's costs fixed in the amount of \$6,000.00.
- (5)
- (6)
- (7)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT SYDNEY

SYG 1571 of 2016

THI NGOC NO NGUYEN

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

Background

1. This is an application for a Constitutional writ within the Court's jurisdiction under s.476 of the *Migration Act 1958* (Cth) ("the Act") in respect of a decision of the Administrative Appeals Tribunal ("the Tribunal") made on 16 May 2016 affirming a decision of the delegate not to grant the visa applicant's Partner (Provisional) (Class UF) visa.
2. The applicant was the visa applicant before the Tribunal, and the review applicant was his alleged wife and sponsor. The other three applicants were members of a family unit and are not parties to the proceedings before this Court.

3. The applicant is a citizen of Vietnam. On 29 May 2014, the visa applicant applied for a partner visa made on the basis of his relationship with the sponsor. The three children were identified as dependant visa applicants.

Before the Delegate

4. On 5 January 2015, the delegate refused to grant the visa applicant a partner visa. The delegate identified the criteria to be satisfied at the time of the decision is cl.309.211 and 309.221 of Schedule 2 to the *Migration Regulations 1994* (Cth) (“the Regulations”). The delegate made reference to the parties producing evidence of their marriage and the requirement to meet the definition of “spouse” in s.5F of the Act and the need to take into account reg1.15A of the Regulations.

5. Assessment of Cl. 309.211(2) of Schedule 2 to the Regulations

6. *a) The financial aspects of the relationship*

7. In relation to the financial aspects of the relationship, the delegate recognised the difficulty of combining financial affairs, joint ownership of assets and pooling of financial resources when the applicant and the sponsor live in separate countries.

8. *b) The nature of the household*

9. In relation to the nature of the household, the delegate observed that it is difficult to demonstrate the nature of the household of the applicant and the sponsor in the present case is that of spouses.

10. *c) The social aspects of the relationship*

11. In relation to the social aspects of the relationship, the delegate was not satisfied that the applicant and the sponsor present themselves to family and friends as being in a committed spousal relationship, or are regarded as such by other people.

12. *d) The nature of the person’s commitment to each other*

13. In relation to the nature of the persons’ commitment to each other, the delegate made reference to having considered the circumstances of the first meeting, the relationship development, the length of time that they

had lived together, the degree of companionship and emotional support that they draw from each other and whether they see the relationship as long term.

14. The delegate made reference to the fact that it could reasonably be expected that the applicant would be able to demonstrate quite substantial knowledge of the sponsor and various aspects of the sponsor's life. The delegate identified a number of factors that the applicant did not know. The delegate was not satisfied that the parties communicate with and draw a degree of emotional support from one another as could be expected by people who genuinely intended to live together as spouses.
15. The delegate also made reference to the sponsor's claim that the sponsor separated from her ex-spouse in 2004 and divorced on 11 November 2014. The delegate made reference to departmental systems indicating that the sponsor travelled with her ex-spouse on eleven occasions after their separation in 2007, 2010, 2011, 2012 and 2013 and that they were in Vietnam at the same time in February and March of 2014. The delegate said that based on that evidence, the delegate found the sponsor travelled extensively with her ex-spouse after they were separated and found that the sponsor was still in a relationship with the ex-spouse.
16. The delegate found that the evidence indicates that the parties undertook a divorce of convenience for the purpose of lodging this application. The delegate found on the evidence that it was not sufficient to demonstrate that the visa applicant and the sponsor are in a genuine continuing spousal relationship, nor that the applicant and sponsor have a mutual commitment to a shared life together to the exclusion of all others.
17. The delegate found the applicant was not the spouse of the sponsor as defined in s.5F of the Act and found that the applicant did not meet the criteria for the grant of a visa.

Before the Tribunal

18. On 15 January 2015, the applicant applied to the Tribunal for review of the delegate's decision. In the application for review, there is a

checklist identifying attachments. One of the documents attached to the application for review made by the applicant was a copy of the decision from the Department of Immigration and Border Protection which had a tick next to it. This was the subject of the application for review.

19. The applicant's lawyer was sent a letter on 15 January 2015 by email which included a letter addressed to the applicant and drew attention to the need to provide material to the Tribunal as soon as possible.
20. Also provided was a migration document titled "Migration Review Tribunal – Information for Review Applicants". That information included the following:-

You should provide an English translation by an accredited translator of any documents written in other languages. Please send both the documents and the translations to the Tribunal.

21. On 23 February 2015, the Tribunal sent to the applicant's lawyer a response to the request for the material relating to the application and provided the folios identified to the applicant.
22. On 20 January 2016, the Tribunal wrote to the applicant identifying that the Tribunal had not been able to make a favouring decision on the information provided alone and invited the applicant to attend a hearing date on 12 February 2016. The letter drew attention to the review being one which would have to take into account certain matters regarding the relationship between the visa applicant and the sponsor.
23. There was reference to those matters including the financial and social aspect of the relationship, the nature of the household and the nature of each person's commitment to the relationship. There was a request to provide the additional information by no later than 5 February 2016.
24. On 11 February 2016, the day before the hearing before the Tribunal, the applicant's lawyer sent three emails. The first email relevantly provided:-

We enclose herewith the following information for inclusion in the AAT file.

25. Underneath that was the words provided:-
- (1) Records of calls and message log between the review applicant wife and her husband via Viber in 2015.*
26. The second email dated 11 February 2016 also set out relevantly:-
- We enclose herewith the following evidences for inclusion in the AAT file.*
27. Underneath that:-
- (2) Records of calls and message log between the review applicant wife and her husband via Viber in 2015 between August – December 2015 inclusive.*
28. The third email also relevantly commenced:-
- We enclose herewith the following evidences for inclusion in the AAT file:*
- 3. Records of calls and message log between the review applicant wife and her husband via Viber in 2016 between January – February 2016 inclusive.*
29. The email also provided certain other documents.
30. A fourth email was sent on 11 February 2016 which also relevantly provided:-
- We enclose herewith the following evidence for inclusion in the AAT file.*
31. And relevantly included paragraph 10 as follows:-
- All correspondences and communication by letters from the applicant husband to his wife addressed to a particular address between between January 2015 - January 2016 inclusive.*
32. Attached to that last email were nine letters. Attached to the earlier three emails were date and time logs in roman numerals together with Vietnamese language and it appears Vietnamese Viber comments. The nine letters were also in Vietnamese. No translation was provided to the Tribunal.

33. At the commencement of the hearing, the Tribunal made clear that it had not been able to look at the material that had just been submitted, clearly referring to the documents provided on 11 February and said, “that will be taken into account in my decision.”
34. The Tribunal also identified that it had read the additional submissions that had been made to the Tribunal. The reference to the additional submissions was a reference to the emails and the description of the various documents provided in the emails. No other submissions were provided by the legal representative to the Tribunal. The Tribunal at the hearing made apparent that the main issue in the course of the hearing was the need to consider whether the applicant was in a genuine and continuing relationship at the time of the hearing before the Tribunal.
35. The Tribunal raised with the applicant the timing in relation to divorce and also raised that the applicant would have seen from the delegate’s decision that the applicant’s sponsor had travelled several times with her former husband and was asked:-

Do you know why your wife’s former husband was in Vietnam at that time time?

36. The applicant responded that he did not know why. However, after the applicant’s visa application was rejected the applicant asked his current wife why and she did say that she has a share in a business.
37. The Tribunal asked the applicant:-

“Do you know why she didn’t tell you that before?”

38. And the applicant responded:-

“Because of the business generated the loss not the profit and I think she don’t want to sell face (in term of “Don’t want to sell face” means don’t want to be embarrassed), so she did not want to mention it.”

39. The applicant was then asked when his wife last travelled to Vietnam and was also asked why his wife did not come and visit him. The Tribunal raised with the applicant why the former husband was with the sponsor at the same time the wife was in Vietnam in February and March 2014.

40. The applicant and the applicant's lawyer were given the opportunity of further submissions to the Tribunal. Nothing was raised in the course of the hearing by the applicant or the legal representative that there was any significance to the untranslated documents, beyond the description provided in the email.

41. The Tribunal correctly identified that the relevant issue was whether the applicant and sponsor were in a genuine and continuing spousal relationship. The Tribunal made reference to the requirements of the meaning of spouse in s.5F of the Act and took into account each of the mandatory criteria under reg 1.15A(3) of the Regulations.

a) *a) Financial aspects of the relationship*

42. The Tribunal identified financial aspects of the relationship and accepted that as the applicant and sponsor live in different countries they would not have the opportunity to combine their financial affairs.

43. *b) Nature of the household*

44. The Tribunal made reference to the nature of the household, and found the temporary residence certificate dated 20 April 2015 and 12 May 2015, provides support for the sponsor having registered to reside at the address of the applicant in Vietnam, but does not outweigh concerns about the genuineness of the relationship.

45. *c) The social aspects of the relationship*

46. The Tribunal made reference to the social aspects of the relationship and found that it was not satisfied that the applicant and sponsor present themselves widely as being married to each other.

47. *d) Nature of persons commitment to each other*

48. In relation to the nature of the person's commitment to each other, the Tribunal made reference to having considered the duration of the relationship between the parties, the length of time they have lived together, the degree of companionship and emotional support that they draw from each other and whether they see the relationship as long term.

49. In the course of the Tribunal's reasons in relation to the nature of the relationship, the Tribunal made reference to the evidence that was submitted of Viber records and untranslated letters between the parties. The Tribunal found that the untranslated letters and Viber records did not provide any insight into the nature of the relationship. The Tribunal accepted that they may have kept in touch with each other, but that the reason for that was not clear because of the applicant's children who reside with the sponsor while studying in Australia.
50. The Tribunal made reference to the fact that despite having met in 2010 and married in 2013, the applicant and sponsor's knowledge of each other and plans for the future were cursory and without detail. It was on that basis that the Tribunal found that it was not satisfied the applicant and sponsor see the relationship as a long-term one.
51. The Tribunal made reference to the evidence submitted in support of the sponsor's contention that she continued to travel with her ex-husband because of a business relationship. There is no evidence of a business relationship between the applicant and the former husband to explain that travel together.
52. The Tribunal found that it was not credible that the sponsor would continue to travel with her ex-husband, including arriving and leaving one day apart when she went to Vietnam to marry the applicant. The Tribunal found it was not credible that the sponsor would travel to Hong Kong on a holiday with her ex-partner and daughter ten years after they separated. The Tribunal found it was significant that the applicant claimed he was unaware of the sponsor's continuing business arrangement with her ex-husband and her numerous trips overseas with him since their separation until his visa application was refused on 5 January 2015. The Tribunal noted that the majority of the sponsor's overseas trips with her ex-husband occurred after the applicant and the sponsor were in a relationship. The Tribunal made reference to the fact that this would mean that the sponsor did not disclose an important aspect of her life to the applicant.
53. The Tribunal made reference to the fact that the applicant claimed to have separated from his spouse in 2007 and the sponsor had separated from hers in 2004 yet neither divorced until 2013. The Tribunal stated that this was a factor undermining the claims of a genuine spousal

relationship. The Tribunal found it is not plausible that the applicant did not divorce for six years because he hoped to reconcile with his ex-wife who was a gambler, or that the sponsor did not divorce because she still got on well with her ex-husband. The Tribunal was not satisfied that the applicant and sponsor provide each other with companionship and support or that they have a commitment to a long-term relationship.

54. The Tribunal found having regard to all the circumstances, that the Tribunal was not satisfied the applicant and sponsor have a mutual commitment to a shared life as husband and wife to the exclusion of all others, or that the relationship is genuine and continuing. The Tribunal was not satisfied that at the time the visa application was made or at the time of the decision, that the parties were in a spousal relationship.
55. The Tribunal found that the applicant did not meet cl.309.211 or cl.309.221 of Schedule 2 to the Regulations. The Tribunal was not satisfied that the visa applicant met the criteria for the grant of a visa and affirmed the decision of the delegate.

Proceedings before this Court

56. Counsel for the applicant sought leave to rely upon a new ground articulated and identified in the submissions relevantly as follows:-

1. Jurisdictional Error. Failure to consider an integer of the Applicants claim.

The Tribunal failed to consider materials/information provided by the Applicant in support of his claim, relied on the untranslated and unverified material to reach an adverse conclusion and failed to accord procedural fairness to the Applicant, thereby failing to exercise jurisdiction and complete its statutory function.

Particulars

In the cover letters [CB 249, 267 and 315) sent by the Applicant's representative, the representative enclosed records of communication between the sponsor and the Applicant via Viber app ("Records"). The Records were described as "...calls and message log between the review applicant wife and husband via Viber...."

At [39, CB 477] the Tribunal acknowledged that the Records were untranslated at the time of the decision. The foregoing notwithstanding, the Tribunal found that the Records “did not provide any insight into the nature of the relationship” (even though the Records were still untranslated and unverified). Also, the Tribunal, relying on the untranslated Records, speculated that the reason for the Records was not clear and “....could be because of the applicant’s children who reside with the sponsor while studying in Australia” [39, CB 477]. Furthermore, the Tribunal relied on the untranslated Records to arrive at conclusions that were adverse to the applicant (such as “the applicant and sponsor’s knowledge of each other and plans for the future were cursory and without detail” at [39], CB 477) in circumstances where the content of the untranslated material may have provided, without speculation, concrete information and substantial insight into the nature of the parties’ relationship and commitment to each other or lack thereof.

Whilst, the Tribunal may have acknowledged receipt of the Records, it did not consider or review the Records in the real sense required. Consequently, the Tribunal could not determine the extent to which the Records could have assisted the Applicant’s claim of the existence of a spousal relationship between the parties and whether or not it would have altered the Tribunal’s decision.

As stated earlier, the Tribunal acknowledged that the Records were put before it. However, the Tribunal failed to invite the Applicant to explain the contents of the Records and its relevance to the parties’ claims. This was a crucial aspect of the Tribunal’s task and as such failure to complete its function and afford the Applicant procedural fairness resulted in jurisdictional error.

*The failure of a Tribunal to obtain the translation of a document or its failure to inform the applicant who has furnished the document that it does not propose to rely on the untranslated document (thereby denying the applicant of an opportunity to explain its contents) will result in a denial of procedural fairness: *X v Minister for Immigration & Multicultural Affairs* (2002) 116 FCR 319.*

The Applicant submits that the fundamental question in the Tribunal’s review was whether the Applicant and the sponsor were in a spousal relationship and as such, significant records of the parties’ communication could include material evidence of pivotal importance, evidence fundamental to the parties’ claim that they were in a spousal relationship, evidence relevant to the

question/fact in issue such that a failure to give consideration to its contents caused jurisdictional error.

Consequently, the Tribunal erred and fell into error in that the Tribunal failed to:

- Obtain the translation of the Records in circumstances where it was crucial to the Tribunal's review task*
- Inform the Applicant on how it was going to use the Records*
- Give the Applicant an opportunity to explain the content of the Records, that in itself resulting in a denial of procedural fairness: X v Minister for Immigration & Multicultural Affairs (2002) 116 FCR 319*
- Ask the Applicant a series of questions about the Records in order to ascertain the gist of each document for the purposes of understanding the way in which the Applicant sought to rely on them.*

The Applicant accepts that in general the Tribunal is not obliged to obtain a translation of documents furnished by the applicant in a foreign language at least in circumstances where the Tribunal ascertains the gist of the material if it is significant: Cabal v Minister for Immigration & Multicultural Affairs [2001] FCA 546. In S14/2002 v Minister for Immigration and Multicultural and Indigenous Affairs) [2003] FCA 1153, Moore J found that "it was sufficient for a decision-maker to ascertain 'the gist' of untranslated documents so as to ascertain 'the way in which the applicant relied upon them'. The decision of Moore J was subsequently applied in cases such as SZLSW v Minister for Immigration and Multicultural Affairs [2008] FCA 1321; (2008) 103 ALD 580 at [12]."

However, the Applicant submits that in this case, the Tribunal was not able to ascertain the gist of the material because the Tribunal failed to (i) ask the relevant questions; (ii) give the Applicant an opportunity to explain the relevance of the Records and the Records were still untranslated at the time of decision.

It was the Applicant's reasonable expectation that the Tribunal would have taken the necessary steps to ascertain the content and relevance of the Records. Subsequently, if the documents were not deemed of any weight in the decision making process, the Tribunal should have disclosed this information to the Applicant. In this case, the Tribunal did not (i) give reasons for not translating the Records; (ii) provide an insight on how it

proceeded to use the Records; (iii) consider the Records put forward by the Applicant (iv) make specific enquiries relating to their contents; (v) satisfy itself that it fully comprehended the contents of the Records and as such the Tribunal failed to discharge its duties, leading to a demonstrable jurisdictional error.

The Applicant relies on the full court's decision in MZXTZ v Minister for Immigration & Citizenship (includes Corrigendum dated 17 August 2009) [2009] FCA 888 at 43: ".....It is well-established that the Tribunal cannot refuse to consider material that is written in a language other than English. See X v Minister for Immigration & Multicultural Affairs [2002] FCA 56 (2002) 116 FCR 319 at [26]-[31] per Gray J and [49]-[52] per Moore J. The Tribunal could have obtained its own translation of the document, or could have invited the appellant to provide a translation, verified in some appropriate way".

Likewise in Cabal v Minister for Immigration and Multicultural Affairs [2001] FCA 546 at [25] the Full court noted that the tribunal may be under an obligation to obtain a translation of a particular document which was in a foreign language and whose relevance had been explained to the tribunal. The Applicant contends that given the circumstances of the case – particularly the fact that the couple lived in different countries, that this is a case where the Tribunal had an obligation to obtain translation of the Records and if in the alternative the court finds that the tribunal was not required to consider or translate the Records, the Applicant further asserts that the Tribunal's failure to prompt or grant the applicant an opportunity to explain the relevance of the material amounted to the denial of procedural fairness.

The question whether Tribunal is obliged to consider a document or documents will depend on the circumstances of the case and the nature of the document: Full Court in VAAD v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCAFC 117 at [77]. The relevant factors in relation to (corroborative) evidence include first, the cogency of the evidentiary material and, second, the place of that material in the assessment of the applicant's claims: SZWCC at 112

The question that comes to the fore in respect of the failure of a Tribunal to consider material put before it is the nature of the material and whether the failure is such that it will result in a jurisdictional error. As stated in SZWCC "The fundamental question must be the importance of the material to the exercise of the Tribunal's function and thus the seriousness of any error. In

my opinion the distinction between claims and evidence provides a tool of analysis but is not the discrimen itself. Further, it is important not to reason that because a failure to deal with some (insubstantial or inconsequential) evidence will, in some circumstances, not establish jurisdictional error, then a failure to deal with any (substantial and consequential) evidence will also not establish jurisdictional error”: SZWCC v Minister for Immigration and Border Protection [2015] FCA 1402 at 111.

57. The Court granted the applicant leave to rely upon the new ground and dispensed with the need for the filing of any further amended application.
58. The applicant also relied upon the following two grounds:-

Ground Two: Jurisdictional Error: The Tribunal failed to comply with the requirements of s 359A of the Migration Act. The Tribunal failed to give to the Applicant clear particulars of information which the Tribunal considered would be the reason, or a part of the reason, for affirming the decision that was under review, thereby contravening s359A of the Migration Act.

Particulars

[At CB 206] The delegate’s decision record states that “Departmental systems indicate that the sponsor travelled overseas with her ex-husband in August 2012, however the applicant was not aware of their trip” (“Travel Information”)

[At 20, CB 474] “The Tribunal referred the applicant to the fact that the sponsor had travelled a number of times with her ex-husband since their separation. He said prior to his visa application being rejected, he had not known that, but afterwards he asked his wife about it and she told him she had a share in his business. The applicant said he thought his wife had not told him about it before because the business suffered losses and she wanted to save face and not mention it.”

[At 41, CB 477] “The Tribunal does not find it credible that the Sponsor would continue to travel with her ex-husband ”

[At 42, CB 477] The Tribunal is not satisfied the applicant and sponsor provide each other with companionship and support or that they have a commitment to a long term relationship. [At 45, CB 478] Given these findings the Tribunal is not satisfied that at the time the visa application was made and the time of this decision the parties were in a spousal relationship.

The Applicant contends that the Travel Information constitutes 'information' that falls within s359A (1) and the Tribunal failed to issue the applicant an appropriate Section 359AA Notice in relation to the Travel Information.

Whilst the Tribunal had drawn the Applicant's attention to the Travel Information at the hearing, the Tribunal did not advise him that he could seek additional time to comment on or respond to the information as required under s.359AA. The Tribunal had considered that this piece of information would form a significant part of its reason for affirming the decision and yet did not provide particulars of the Travel Information in accordance with s.359A of the Act. The Applicant contends that the exception in s359A (3) does not apply because the Tribunal did not give the particulars of the Travel Information to the Applicant.

In essence, the evidence of Travel Information given by the Sponsor gave rise to obligations under s.359A of the Migration Act 1958 (Cth) (the "Act"). S 359A (1) of the Act requires the Tribunal to give to the Applicant clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review. It must also ensure as far as reasonably practicable that the Applicant understands why the information is relevant to the review and the consequences of it being relied on in affirming the decision under review.

It is the Applicant's position that based on the Tribunal's findings [at 41, CB 477] and [at 45, CB 478] the Travel Information constituted "what the Tribunal considered would be reason or part of the reason for affirming the decision under review" in that it undermined the Applicant's claim that he was in a genuine and continuing relationship with the sponsor: SZBYR v Minister for Immigration and Citizenship [2007] HCA 26 The extractions from the Tribunal's decisions (above) demonstrate the role that the Travel Information played in the Tribunal's conclusion [at 45, CB 478]

As was stated in Bani Hani v Minister for Immigration & Anor [2016] FCCA 483 at 120 "It is nonetheless the case that the Tribunal's reasons for decision provide a starting point and may provide an indication as to whether or not particular information was information that the Tribunal at an earlier stage considered would be the reason or part of the reason for affirming the decision under review"

The foregoing notwithstanding, the Applicant accepts that the obligation in s359A is not strictly enlivened by having regard to the matters addressed in the Tribunal's reasons for decision. As the plurality stated in SZBYR at [17]:

"The statutory criterion does not, for example, turn on "the reasoning process of the Tribunal," or "the Tribunal's published reasons." The reason for affirming the decision that is under review is a matter that depends upon the criteria for the making of that decision in the first place. The Tribunal does not operate in a statutory vacuum, and its role is dependent upon the making of administrative decisions upon criteria to be found elsewhere in the Act. The use of the future conditional tense ("would be") rather than the indicative strongly suggests that the operation of s 424A(1)(a) is to be determined in advance - and independently - of the Tribunal's particular reasoning on the facts of the case".

Applying the High Court's decision as outlined above, in this case, the "reason, or a part of the reason, for affirming the decision that is under review" would depend on the criteria for the making of that decision, which in this case is the requirement in 309.211 and 309.221 of the Regulations – that the Applicant is the spouse of the sponsor. Consequently, it is easy to accept that the Travel Information which suggests that the Sponsor was still in a spousal relationship with her ex-husband, would constitute "information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review". Basically, the Travel Information was Information which was capable of supporting the notion that the parties were not in a genuine and continuing spousal relationship and as such was information that was critical to the tribunal's review of the delegate's decision. 11

Given the potency of the Travel Information, the Applicant was "entitled to know the circumstances in which his sponsor was said to have travelled with her ex-husband and he was also entitled to know not only of the existence of the Department's records but to know their content. The Travel Information sowed the seeds of doubt in respect of the sponsor's continuing relationship with her ex-husband and yet these records and their content were not communicated to the Applicant. It is the Applicant's submission that the operation of s 359A (1) was thus enlivened.

Furthermore, the failure on the part of the Tribunal to make a copy of the Travel Information to the visa applicant or give particulars of the Travel Information to the Applicant amounted

to a breach of s359A and jurisdictional error. The operation of s359A (1) is mandatory and a breach of the section constitutes jurisdictional error: SZBYR AT 13.

The Applicant submits that the present case is an example of a case where the Tribunal was required to provide more particulars about the Travel Information (other than just the fact that it existed) to ensure that the opportunity to “comment ... or respond ...” is meaningful :SZNKO v Minister for Immigration and Citizenship [2010] FCA 297 at 23 per Flick J

The principle advanced in SZNKO is that 359A (like s.424A) requires disclosure of so much as to ensure that the opportunity to comment or respond is meaningful. Thus, it was important for the Applicant to understand the surrounding context in which the Travel Information was obtained, questions like – how many times had the Sponsor travelled with her ex-husband, was the Sponsor travelling with her ex-husband alone or was their daughter with them? These are questions that were relevant to the Applicant providing an effective and reasonable explanation.

3. Jurisdictional Error: The Tribunal misdirected itself and asked the wrong question

Particulars

At [3] the delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211 and 309.221 because the definition of spouse according to section 5F of the Migration Act was not met. In this context, as set out above, s.5F of the Act provides the definition of “spouse” for the purposes of the Act. To be a “spouse” a person must be in a “married relationship”. Section 5F(2) sets out the factors relevant to, and which must be met before a person can be said to be in, such a “marital relationship” for the purposes of the Act. Each of the matters at ss.5F(2)(a) to (d) of the Act must be cumulatively met such as to fall within the definition. Hence, the statutory question (under cl 309.211) before the Tribunal was whether the applicant was the spouse of the sponsor.

[At 42] the Tribunal concluded:

“The Tribunal is not satisfied the applicant and sponsor provide each other with companionship and support or that they have a commitment to a long term relationship”.

It was open to the Tribunal to conclude as it did at [42]. However, in arriving at its conclusion at [42], the Tribunal noted [at 41] that it “ finds it significant that the

applicant claimed he was unaware of the sponsor’s continuing business arrangement with her ex-husband and her numerous trips overseas with him since their separation until his visa application was refused on 5 January 2015” (the “Secret”). Apparently, the fact the Sponsor did not disclose the Secret to the Applicant, was instrumental to the Tribunal’s conclusion that the parties do not provide each other with companionship and do not have a commitment to a long term relationship.

The Tribunal was clearly of the view that the requirements of a “mutual commitment to a shared life as husband wife to the exclusion of all” and “genuine and continuing” relationship is not compatible with one party keeping a secret. The Tribunal considered that there had to be “full disclosure and transparency” between the parties for them to be in a spousal relationship This is a mistaken and erroneous view: Angkawijaya & Anor v Minister for Immigration & Anor [2015] FCCA 450

In forming the erroneous view mentioned above, the tribunal misdirected itself about the question it had to answer. Rather than consider whether the Applicant and sponsor, at the relevant time, had a mutual commitment to a shared life as husband and wife to the exclusion of all others, the tribunal asked itself whether they had a good relationship. Consequently, the tribunal fell into jurisdictional error.

Acceptably, the sponsor’s apparent strong ties with her ex-husband is not conventional, considering the passage of time since their divorce. Likewise in most conventional marriages, it is expected that the couples will share information and not keep secrets. However, it does not necessarily follow that the parties relationship does not meet the test of a spousal relationship for the purposes of s5F of the Act. There could have been reasonable and legitimate reasons why the sponsor chose not to disclose the secret travel. As stated by Street CJ in R v Cahill:

“...neither can the Tribunal set itself up as the arbiter of community expectations in relation to what is a genuine marriage”

In essence, the Tribunal was required to assess the nature of the parties’ relationship with each other in light of its particular circumstances. In light of the Tribunal’s finding as to the nature of

the relationship at [42], the sponsor's non-disclosure of the Secret was not a factor critical in determining whether the relationship was "genuine".

59. The application identified Grounds 1, 2 and 4, which Counsel confirmed were not pressed. Grounds 3 and 5 that were pressed in the application have been treated by the Court and the parties in submissions as Grounds 2 and 3.

Consideration

60. In relation to Ground 1, Ms Okereke-Fisher of Counsel contended that the Tribunal did not consider or have regard to the untranslated documents. Ms Okereke-Fisher contended that the documents were relevant to the mandatory considerations and may have revealed something about the planning of the parties for the future. Ms Okereke-Fisher submitted that the Tribunal had available to it other options by reason of which, after the hearing it could have invited the applicant to provide translations or invited the applicant to put further submissions in relation to the relevance of the documents.
61. On the evidence before the Court, the applicant had a real and meaningful hearing on 12 February 2016. The applicant appeared on that date to give evidence and present arguments and was assisted by the applicant's migration agent. There was no duty upon the Tribunal that required the Tribunal to translate the documents provided in Vietnamese.
62. There was no procedural unfairness in the conduct of the review by the Tribunal. The applicant had been informed prior to the hearing that the Tribunal had not been able to determine the matter favourably and invited the applicant to attend a hearing. The applicant and the applicant's lawyer had the opportunity to give evidence and present submissions at the hearing.
63. Nothing was advanced by the applicant's lawyer or the applicant as to materiality or significance of the letters and of other communications beyond the content of what was described in the email. The Tribunal took into account the gist of the communications as described in the emails. The Tribunal's reasons express having done so. This is not a case where there is a failure by the Tribunal to have regard to relevant

material. The Tribunal took into account the gist of the untranslated documents as described in the covering email provided by the legal representative of the applicant. I reject the submission that the Tribunal did not complete its function in the conduct of the review. There is no jurisdictional error as alleged in Ground 1. Further there was no steps taken to prove any materiality in relation to the untranslated documents and no practical injustice arises even if an alleged error were made out. Accordingly, the Court would as a matter of discretion have declined to grant relief in respect of this alleged error.

64. In relation to Ground 2, Ms Okereke-Fisher contended that the information in relation to the travel by the sponsor with her ex-husband was information that enlivened an obligation under s.359A of the Act. Ms Okereke-Fisher contended that the departmental records were the relevant information which should have been the subject of compliance with either s.359A or s.359AA of the Act. Ms Okereke-Fisher submitted that it was not sufficient to say that information was derived from the decision of the delegate which was provided to the Tribunal at the time of the application for review. Ms Okereke-Fisher contended that the Departmental system's records was the primary source of information that should have been the subject of compliance with s.359A or s.359AA of the Act.
65. On the evidence before the Court, I accept that the information the subject of the alleged Ground 2 was information provided to the Tribunal falling within s.359A(4)(b) of the Act, insofar as the information might otherwise have enlivened any obligation under s.359A of the Act. I do not accept the contention that the travel system records as to travel by the sponsor with her ex-spouse was information that enlivened any obligation under s.359A of the Act. However, even if it was, for the reason I have given, in the present case s.359A(4)(b) of the Act means that the relevant information was in fact given by the applicant for the purpose of the application for review within s.359A(4)(b) of the Act. The applicant's knowledge of the travel arrangements was a credit finding of a kind that did not enliven any obligation under s.359A of the Act. Ground 2 fails to make out any jurisdictional error.
66. In relation to Ground 3, the Tribunal identified the correct question. The Tribunal's reasons are not to be read with a keen eye for error.

Ground 3 is in substance an impermissible challenge to the adverse findings on the merits by the Tribunal. The Tribunal did not find that there must be full disclosure. The Tribunal found it was not satisfied that the applicant met the identified criteria. There was no misdirection by the Tribunal. The Tribunal identified the correct criteria and did not ask the wrong question. No jurisdictional error is made out by Ground 3.

67. The application is dismissed.

I certify that the preceding fifty-four (54) paragraphs are a true copy of the reasons for judgment of Judge Street

Date: 15 December 2016